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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

9 MIKHAIL MOISEEV,

10 Petitioner,

11 v.

12 NATHALIE R. ASHER, Field Office Director,
13 *et al.*,

14 Respondents.

)
)
) Case No. C11-1491-MJP-BAT
)
)

15 **REPORT AND**
16 **RECOMMENDATION**

17 **I. INTRODUCTION AND SUMMARY CONCLUSION**

18 Petitioner Mikhail Moiseev is a native and citizen of Russia who is being detained by the
19 United States Immigration and Customs Enforcement (“ICE”) pursuant to a final order of
20 removal. On September 9, 2011, petitioner filed a pro se Petition for Writ of Habeas Corpus
21 pursuant to 28 U.S.C. § 2241, which challenges the constitutional and statutory authority of ICE
22 to detain him any further due to the unlikelihood of his removal from the United States in the
23 reasonably foreseeable future. (Dkt. No. 7.) He requests that this Court “[o]rder the ICE to
release Petitioner from its custody immediately (under reasonable conditions of supervision).”
Id. at 5. Respondents have filed a Return Memorandum and Motion to Dismiss, arguing that
petitioner is lawfully detained pursuant to Section 241(a)(1)(C) of the Immigration and

1 Nationality Act, 8 U.S.C. § 1231(a)(1)(C), because of his continued refusal to complete a travel
2 document application and his rigorous efforts to prevent ICE from removing him. (Dkt. No. 11
3 at 9.)

4 After careful review of the entire record, the Court recommends that respondents' motion
5 to dismiss be **GRANTED**, and that this matter be **DISMISSED** with prejudice.

6 II. BACKGROUND AND PROCEDURAL HISTORY

7 Petitioner is a native and citizen of Russia who was admitted to the United States on or
8 about November 1, 1991, as a B-2 visitor for pleasure with authorization to remain in the United
9 States for a temporary period not to exceed April 30, 1992. (Administrative Record ("AR") at
10 R27, R624-25, R456.) Petitioner remained in the United States beyond April 30, 1992, without
11 authorization. (AR at L89.) On or about October 5, 1992, petitioner was served with an Order to
12 Show Cause ("OSC") charging him with removability for overstaying his visa. (AR at R25-27.)

13 At the hearing before the Immigration Court, petitioner admitted the charges contained in
14 the OSC, but requested relief under the Immigration and Nationality Act ("INA") instead of
15 deportation. (AR L276.) On December 19, 2003, the Immigration Judge ("IJ") denied
16 petitioner's request for asylum, withholding of removal, adjustment of status, and relief under the
17 Convention Against Torture, and ordered him removed to Russia based on the charges contained
18 in the OSC. (AR at L90, L270-76.) Petitioner appealed the IJ's decision to the Board of
19 Immigration Appeals ("BIA"), which affirmed the IJ's decision and dismissed the appeal on
20 April 9, 2004. (AR at L277.)

21 On December 24, 2003, ICE requested a travel document from the Consulate General of
22 Russia for petitioner's removal to Russia. (AR at R303.) On April 28, 2004, petitioner was
23 interviewed by a representative of the Consulate. (AR at R277-78.) Petitioner was released into

1 the Intensive Supervision Appearance Program (“ISAP”) while his travel document request was
2 pending. (AR at L115, 212.) On or about March 5, 2005, however, petitioner’s release was
3 terminated after he absconded from ISAP. (AR at L112-13, R483.) On April 30, 2008,
4 petitioner was discovered at the San Mateo County Jail where he was incarcerated pending state
5 criminal charges. (AR at R412.) Petitioner was transferred from the San Mateo County Jail to
6 ICE custody on September 28, 2009. (AR at R600, 625.) ICE subsequently resumed its efforts
7 to obtain a travel document from the Russian Consulate for petitioner’s removal. (AR at R483,
8 598.)

9 On December 11, 2009, ICE conducted a Post Order Custody Review of petitioner’s
10 case. (AR at 482-601.) ICE recommend that petitioner remain detained, noting:

11 [Petitioner] intentionally hindered his removal from the U.S. by providing false
12 information on his travel document application and his history of absconding
13 indicate he presents an unacceptable flight risk if released. [Petitioner] has a
14 lengthy criminal history including narcotics, property, financial, and identity fraud
15 crimes. His release would present an unacceptable danger to the community. The
16 latest travel document application packet submitted to the Russian consulate
17 includes a copy of his expired Russian passport. Obtaining a new travel
18 document is foreseeable upon [petitioner’s] willingness to provide his correct
19 address in Russia. I recommend that [petitioner’s] detention continues for an
20 additional 90 days.

21 (AR at R483.)

22 On December 15, 2009, the Russian Consulate issued a travel document for petitioner’s
23 removal which was valid from December 23, 2009 to January 6, 2010. (Dkt. No. 11, Ex. A, ¶6.)
ICE scheduled petitioner to be removed on December 29, 2009, however, on the day of travel,
petitioner “balled up in the fetal position and began to cry, refusing to get off the floor, stating
that he did not wish to go back to Russia.” *Id.* at ¶7. A decision to cancel the removal was made
after petitioner refused to board the aircraft. (AR at R513, 598.)

1 On February 17, 2010, the Russian Consulate issued a second travel document request
2 which was valid from February 17, 2010, to March 3, 2010. (AR at R515.) On February 22,
3 2010, ICE attempted to remove petitioner a second time, however, petitioner “cut[] himself,
4 while booking out at the Bakersfield ICE office, with a razor blade that was obtained from the
5 detention center in Kern County Jail. Petitioner’s injuries required emergency medical attention,
6 and the removal was cancelled.” (Dkt. No. 11, Ex. A, ¶9.)

7 On March 2, 2010, ICE submitted a new travel document request to the Russian
8 Consulate. (AR at R524, 595.) In response, the Consulate advised ICE that petitioner would
9 need to submit a new travel document application “by himself and sign it.” (AR at R525, 595.)
10 However, petitioner has refused to cooperate by filling out a new travel document application.
11 (Dkt. No. 11, Ex. A, ¶10.) Specifically, petitioner was presented with and refused to complete a
12 travel document application on March 5, 2010, April 2, 2010, April 15, 2010, April 28, 2010,
13 January 20, 2011, March 22, 2011, April 1, 2011, July 19, 2011, August 18, 2011, and
14 September 26, 2011. *Id.* at ¶11. Accordingly, ICE served petitioner with notices Warning of
15 Failure to Depart and Instruction Sheet to Detainee Regarding Requirement to Assist in
16 Removal, which petitioner refused to sign. (AR at R544-45, 563-64, 606-07, 628-39, 640-41,
17 646-47, 654-55, 667-70.)

18 On July 18 2011, ICE issued a Notice of Failure to Comply Pursuant to 8 C.F.R. 241.4(g)
19 stating, in part, as follows:

20 On June 10, 2011, you were advised, via form I-229(a) and Instruction Sheet to
21 Detainee, of specific requirements to complete and were given 30 days to comply
22 with your obligation to assist in obtaining a travel document. In addition to the I-
23 229(a) and Instruction Sheet to Detainee served to you on June 10, 2011, you
were served an I-229(a) and Instruction Sheet on May 12, 2011, March 22, 2011,
January 20, 2011, January 14, 2011, April 2, 2010, March 5, 2010, and October 5,
2009.

1 Although you have been explained your requirements to assist ICE in obtaining
2 travel documents, you have continuously taken steps to prevent your removal
3 from the United States to Russia. On numerous occasions, you have failed to
4 complete the required travel document application, which is required by your
5 country, in order to facilitate your removal; you displayed disruptive behavior
6 when ICE agents attempted to place you on your flight on December 29, 2009; on
7 February 22, 2010, you inflicted injury upon yourself in order to prevent your
8 removal. To this day, you still refuse to cooperate.

9 The burden to obtain a travel document for your removal does not solely rest with
10 ICE. Pursuant to Section 241(a)(1)(C) of the [INA], you are required to make
11 timely and good faith efforts to obtain travel or other documents necessary for
12 your removal from the United States. If you fail to make these efforts, Section
13 241(a)(1)(C) allows for the extension of the removal period.

14 As you are still within the removal period, you are to remain in ICE custody until
15 you demonstrate that you are making reasonable efforts to comply with the order
16 of removal and that you are cooperating with ICE's efforts to remove you.

17 (AR at 648-50.)

18 June 10, 2011, ICE informed the Russian Consulate that petitioner has refused to
19 complete a new travel document application. (Dkt. No. 11, Ex. A, ¶12.) In response, the
20 Consulate indicated that it would accept the submission of the old travel document application,
21 the previously issued travel document, photos, and cover letter for review. The Consulate further
22 indicated that "the issuance of a new travel document was highly likely given the issuance of the
23 previous travel document." *Id.*

ICE reports, however, that petitioner has indicated he will refuse to board any plane
bound for Russia, and has stated that "he would like to see ICE try putting him on a flight to
Russia." *Id.* at ¶14. "Consequently, ICE does not believe it would be prudent or productive to
resume a travel document request until it is satisfied that Petitioner's removal will be effectuated
as scheduled." *Id.* Instead, ICE is seeking to arrange to transport petitioner aboard a non-
commercial chartered flight dedicated to transporting individuals for government purposes. *Id.* at

¶15. Although the timeframe for securing a chartered flight is unknown, ICE has submitted a request to the Travel Document Unit at ICE headquarters in Washington, D.C. *Id.* ICE indicates that if petitioner decides to cooperate or a charter flight becomes available, ICE will resubmit a request for a travel document to the Russian Consulate. *Id.* ICE indicates that, aside from petitioner’s refusal to complete the required travel document application, there are currently no barriers to petitioner’s removal. *Id.* at ¶13.

III. DISCUSSION

Section 241(a)(1)(A) of the INA states that “[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall remove the alien from the United States within a period of 90 days (in this section referred to as the ‘removal period’).” INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). During the removal period, continued detention is required. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2)(“During the removal period, the Attorney General shall detain the alien.”). Under Section 241(a)(6), the Attorney General may detain an alien beyond the 90-day removal period. INA § 241(a)(6), 8 U.S.C. § 1231(a)(6).

In *Zadvydas v. Davis*, 533 U.S. 678, 121 S. Ct. 2491, 2505, 150 L. Ed. 2d 653 (2001), the Supreme Court considered whether the post-removal-period statute, INA § 241(a)(6), authorizes the government “to detain a removable alien *indefinitely* beyond the removal period or only for a period *reasonably necessary* to secure the alien’s removal.” *Zadvydas*, 533 U.S. at 682. The petitioners in *Zadvydas* could not be removed because no country would accept them. Thus, removal was “no longer practically attainable,” and the period of detention at issue was “indefinite” and “potentially permanent.” *Id.* at 690-91. The Supreme Court held that INA § 241(a)(6), which permits detention of removable aliens beyond the 90-day removal period, does not permit “indefinite detention.” *Id.* at 689-697. The Court explained that “once removal is no

1 longer reasonably foreseeable, continued detention is no longer authorized by statute.” *Id.* at
2 699. The Supreme Court further held that detention remains presumptively valid for a period of
3 six months. *Id.* at 701. After this six-month period, an alien is eligible for conditional release
4 upon demonstrating “good reason to believe that there is no significant likelihood of removal in
5 the reasonably foreseeable future.” *Id.* at 701. The burden then shifts to the Government to
6 respond with sufficient evidence to rebut that showing. *Id.* at 701.

7 Notwithstanding *Zadvydas*, under INA § 241(a)(1)(C), 8 U.S.C. § 1231(a)(1)(C), “the
8 removal period shall be extended . . . and the alien may remain in detention during such extended
9 period if the alien fails or refuses to make timely application in good faith for travel or other
10 documents necessary to the alien’s departure” In *Pelich v. INS*, 329 F.3d 1057, 1059 (9th
11 Cir. 2003), the Ninth Circuit held that “when an alien refuses to cooperate fully and honestly
12 with officials to secure travel documents from a foreign government, the alien cannot meet his or
13 her burden to show there is no significant likelihood of removal in the reasonably foreseeable
14 future.” The Ninth Circuit explained that the concerns of indefinite detention underlying the
15 Supreme Court’s decision in *Zadvydas* do not exist when the alien “has the ‘keys [to his
16 freedom] in his pocket’ and could likely effectuate his removal by providing the information
17 requested by the [Government].” *Pelich*, 329 F.3d at 1060 (citation omitted); *see also Lema v.*
18 *I.N.S.*, 341 F.3d 853, 857 (9th Cir. 2003)(holding that INA § 241(a)(1)(C) authorizes continued
19 detention of a removable alien as long as the alien fails to cooperate fully and honestly with
20 officials to obtain travel documents). The Court concluded that “*Zadvydas* does not save an alien
21 who fails to provide requested documentation to effectuate his removal. The reason is self-
22 evident: the detainee cannot convincingly argue that there is no significant likelihood of removal
23 in the reasonably foreseeable future if the detainee controls the clock.” *Id.*

1 In the present case, the evidence clearly establishes that petitioner has failed to cooperate
2 with his removal. Petitioner's continued refusal to complete a new travel document application
3 and his disruptive and dangerous behavior have prevented the government from effecting his
4 removal from the United States to Russia. Given petitioner's lack of cooperation, he cannot
5 satisfy his burden under *Zadvydas* to show that there is no significant likelihood of removal in
6 the reasonably foreseeable future. See *Pelich*, 359 F.3d at 1057. Indeed, "[w]e cannot know
7 whether an alien's removal is a 'remote possibility,' *Zadvydas*, 533 U.S. at 690, 121 S. Ct. 2491,
8 until the alien makes a full and honest effort to secure travel documents. A particular alien may
9 have a very good chance of being removed, but if that alien is refusing to cooperate fully with
10 officials to secure travel documents, neither the INS nor a court can sensibly ascertain the alien's
11 chance of removal." *Lema*, 341 F.3d at 856. As the Ninth Circuit found in *Pelich*, petitioner has
12 the keys to his freedom in his pocket and could likely effectuate his removal by providing
13 evidence of his identity. *Pelich*, 329 F.3d at 1060. Accordingly, petitioner's detention is not
14 indefinite, and the Court must deny habeas relief.

15 IV. CONCLUSION

16 For the foregoing reasons, the Court recommends that respondents' motion to dismiss be
17 **GRANTED**, and that this matter be **DISMISSED** with prejudice. A proposed order
18 accompanies this Report and Recommendation.

19 DATED this 21st day of December, 2011.

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22 BRIAN A. TSUCHIDA
23 United States Magistrate Judge